Supreme Court, U.S.
FILED
NOV 14 19
MICHAEL RODAK, JR.

Nos. 80-482 and 80-483

In the Supreme Court of the United States

OCTOBER TERM, 1980

LEAD INDUSTRIES ASSOCIATION, INC., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ST. JOE MINERALS CORPORATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the decision of the court of appeals, upholding the Administrator's promulgation under

the Clean Air Act of the national primary ambient air standard for lead, conflicts with this Court's decision in *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, No. 78-911 (July 2, 1980).

2. Whether the court of appeals correctly held that the Administrator acted within the discretion committed to him under the Clean Air Act in determining an appropriate "margin of safety" to be used in setting the primary standard.

3. Whether the court of appeals correctly upheld the Administrator's determination to adopt a secondary standard that was no more stringent than the primary standard.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-111a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1980. The petitions for a writ of certiorari were filed on September 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Sections 108 and 109 of the Clean Air Act, 42 U.S.C. (Supp. II) 7408 and 7409, require that the Administrator of the Environmental Protection Agency establish national primary ambient air quality standards "which in the judgment of the Administrator, * * * and allowing an adequate margin of safety, are requisite to protect the public health." Section 109(b)(1) of the Act, 42 U.S.C. (Supp. II) 7409 (b)(1).[1] While the Administrator is thus responsible for setting national standards, the Clean Air Act requires that the states develop specific "implementation plans" containing emission limitations and other measures affecting individual sources, as may be necessary to attain and maintain the standards set by the Administrator. Primary standards must

[1] The Act also provides for secondary standards "which in the judgment of the Administrator * * * [are] requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." Section 109(b)(2) of the Act, 42 U.S.C. (Supp. II) 7409(b)(2).

be attained within three years following the approval of a state plan.[2]

On October 5, 1978, the Administrator issued a primary ambient air quality standard limiting the maximum permissible atmospheric concentration of lead to 1.5 micrograms of lead per cubic meter of air (ug Pb/m^3). The Administrator determined that this ambient level was necessary to insure that the blood lead levels in children of 1-5 years, who were conceded to be the most susceptible population, would not exceed 30 micrograms of lead per deciliter of blood (ug Pb/dl) (Pet. App. 113a-166a).[3] See also 43 Fed. Reg. 46246 (1978). Petitioners subsequently brought this action in the United States Court of Appeals for the District of Columbia Circuit, challenging the lead standard on various grounds. On June 27, 1980, the court of appeals affirmed the Administrator's action (Pet. App. 1a-111a).

1. The administrative history and background of the lead standards are thoroughly explained in the opinion of the court of appeals (Pet. App. 3a-24a).

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[2] Secondary standards must be attained within a reasonable time. Sections 110(a)(2)(A) and (B) of the Act, 42 U.S.C. (Supp. II) 7410(a)(2)(A) and (B). See also *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976); *Train* v. *NRDC*, 421 U.S. 60 (1975).

[3] At the same time, the Administrator issued a secondary ambient air lead standard at the same maximum permissible concentration. The Administrator found that this level "will [also] adequately protect against known and anticipated adverse effects on public welfare" (Pet. App. 156a). EPA had previously issued regulations limiting the amount of lead in gasoline; those regulations have been upheld by the courts. *Amoco Oil Co.* v. *EPA*, 501 F.2d 722 (D.C. Cir. 1974); *Ethyl Corp.* v. *EPA*, 541 F.2d 1 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976).

Briefly, lead is an element with valuable industrial properties; it is also a deadly poison that has no known beneficial function in the body and "attacks the blood, kidneys, and central nervous and other systems and can cause anemia, kidney damage, severe brain damage, and death" (Pet. App. 4a). Pursuant to a 1976 court order,[4] lead was listed as a pollutant that may reasonably be anticipated to endanger the public health and welfare, thus requiring the development of national ambient air quality standards. See Sections 108 and 109 of the Act, 42 U.S.C. (Supp. II) 7408 and 7409. On December 14, 1977, a standard of 1.5 ug Pb/m^3 was proposed by the Administrator, based upon scientific information contained in "Air Quality Criteria for Lead" (Criteria Document), which was prepared by a panel of scientists pursuant to Section 108 of the Act, 42 U.S.C. (Supp. II) 7408.[5] The Criteria Document was described by the court of appeals as a "comprehensive and thoughtful analysis of the most current scientific information" about the effects of lead on the body (Pet. App 8a).[6] In addition to numerous diseases, such

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[4] See *NRDC* v. *Train*, 411 F.Supp. 864 (S.D.N.Y. 1976), aff'd, 545 F.2d 320 (2d Cir. 1976).

[5] Section 108(a)(2) of the Act provides that "[a]ir quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air" (42 U.S.C. (Supp. II) 7408(a)(2)).

[6] The Criteria Document was revised three times before publication. Although the initial draft, which proposed a standard of 5 ug Pb/m^3, was criticized for its lack of scholarship and overall poor quality in the area of human health effects, the final document was described by the court below as "the culmination of a process of rigorous scientific and

as anemia and lead poisoning, which are commonly known to be caused by and related to lead, the Criteria Document reported that relatively low levels of lead also caused adverse effects on the hematological (bloodforming) and central nervous systems, two body systems that are of prime importance to human health (Pet. App. 10a-14a).[7]

The Criteria Document reported that lead not only destroys blood cells eventually, but that it also impairs the synthesis of heme within those cells. Heme, which is a critical component of hemoglobin, is essential to the transport of life-sustaining oxygen from the respiratory system to all the cells of the body (Pet. App. 12a-13a).[8] This disruption is indicated by elevated levels of erythrocyte protopophyrin (EP) in red blood cells.[9]

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public review, and thus is a comprehensive and thoughtful analysis of the most current scientific information on the subject" (Pet. App. 8a).

[7] According to the Criteria Document, other body systems are also seriously affected by lead. They include the renal, reproductive, hepatic, endocrinal, cardiovascular, immunologic and gastrointestinal systems (Pet. App. 10a n.8).

[8] Hemoglobin consists of heme and globin. Lead interferes with the synthesis of hemoglobin by affecting several steps in synthesis of the heme molecule and by inhibiting synthesis of the globin moiety (Pet. App. 10a-11a n.9).

[9] An impairment to human health is further indicated by elevated EP in that elevated EP indicates an impairment and dysfunction of the mitochondria, subcellular units that are critical to providing basic energy to the body. Elevated EP therefore raises the possibility that the production of heme proteins in other body systems, including the renal and neurological, may also be impaired. The Criteria Document identified the threshold for elevated EP at 15-20 ug Pb/dl for children and women, and 25-30 ug Pb/dl for adult males (Pet. App. 11a-12a).

The Criteria Document also reported extremely serious neurological damage, including irreversible brain damage and death, occurring in children at blood-lead levels of 80-100 ug Pb/dl (Pet. App. 13a-14). Finally, the Criteria Document reported that neurological and cognitive dysfunctions can begin at blood-lead levels as low as 50-60 ug Pb/dl (Pet. App. 14a).[10]

In October 1978, following an extensive public rulemaking process (see Pet. App. 8a-9a), the Administrator issued final standards with his findings and explanation (Pet. App. 113a-166a). See also 43 Fed. Reg. 46246 (1978). The Administrator concluded that the maximum safe individual blood-lead level for children was 30 ug Pb/dl. Because children between the ages of one and five years constitute the most sensitive population group, the Administrator determined that the air standard should be set at a level that would permit the blood-lead levels to be kept below 30 ug Pb/dl in 99.5% of that population

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[10] The Criteria Document also addressed two other issues integral to the setting of the appropriate ambient air level: (1) the relationship between air-lead and blood-lead levels, and (2) the distribution of a given blood lead level within the general population. The Criteria Document found that the relationship between air and blood levels was not linear, but ranged between a ratio of 1:1 and 1:2 (air-lead/blood-lead), with children falling at the higher end of the range (Pet. App. 15a). With respect to population distribution, the Criteria Document found that there will be a range of blood-lead levels within a group of individuals, and that this range will follow the common bell-shaped pattern of a lognormal distribution, with a predictable number of individuals having blood-lead levels higher than the mean and others having blood-lead levels lower than the mean. The setting of any standard designed to protect the public health would thus have to take into account this distribution (Pet. App. 15a-16a).

group. The Administrator then calculated that an ambient air lead standard of 1.5 ug Pb/m^3 was necessary to achieve that level of protection.

2. The court of appeals upheld the lead standards in a unanimous decision. The court rejected petitioners' contention that the Administrator's authority to prescribe primary standards is limited to situations in which a firm medical consensus has demonstrated that the level of pollution is "clearly harmful to health." The court noted that Congress had given the Administrator a clearly precautionary mandate by giving him broad discretion under the Clean Air Act to prescribe primary ambient air standards to protect the public, including particularly susceptible population groups, from adverse health effects, with provision for an adequate margin of safety (see Pet. App. 42a-48a).

Based on a thorough review of the rulemaking record, including the Criteria Document and public written and oral comments, the court of appeals concluded that the record amply supported the Administrator's determination that 1.5 ug Pb/m^3 was an appropriate primary national ambient air standard, and that this determination was not arbitrary, capricious or an abuse of discretion. Specifically, the court found that the record supported the Administrator's determinations (1) that the first adverse health effect of lead exposure occurs with EP elevation at 30 ug Pb/dl, indicating an impairment of the heme system; (2) that anemia begins in children at 40 ug Pb/dl; (3) that central nervous system deficits begin at 50-60 ug Pb/dl; and (4) that a maximum individual safe blood-lead level of 30 ug Pb/dl is necessary to protect, with an adequate margin of safety, the sensitive population from these increasingly severe adverse health effects (Pet. App. 49a-58a). The court

noted that some industry experts had challenged these determinations, but held that "[i]t is not our function to resolve disagreement among the experts or to judge the merits of competing expert views" (Pet. App. 59a). Such disagreements, the court noted, do not "prevent us from concluding that [the Administrator's] decisions were rational and supported by the record" (*ibid.*).

The court of appeals also found that the method chosen by the Administrator to allow for a margin of safety was within his authority (Pet. App. 62a). The court explicitly rejected the assertion of petitioner St. Joe Minerals Corporation that the Administrator must first determine the ambient level needed to protect public health and then make a separate determination as to the amount by which that level should be lowered to provide an adequate margin of safety. The court of appeals found nothing in the language or legislative history of the Act to require the Administrator to adopt that particular approach. The court noted that the Administrator had in fact considered that approach, and that he had explained his reasons for rejecting it. The court concluded that the choice between several possible approaches was a policy choice "specifically left to the Administrator's judgment" (Pet. App. 61a-62a). The court also rejected petitioners' contention that the Administrator must consider economic costs and technological feasibility in providing for the "adequate margin of safety." The court held that "the statute and its legislative history make clear that economic considerations play no part in the promulgation of ambient air quality standards under Section 109" (Pet. App. 31a-32a).[11]

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[11] The court also found extensive record support for: (1) the Administrator's choice of an air-lead/blood-lead ratio

In conclusion, the court of appeals described the promulgation of national ambient air quality standards for lead as "the culmination of a process of rigorous scientific and public review which permitted a thorough ventilation of the complex scientific and technical issues presented * * *" (Pet. App. 111a). The court also acknowledged that difficult and controversial scientific questions had been encountered in the process and stated that "both the EPA and the participants in the rulemaking proceeding deserve to be commended for the diligence with which they approached the task of coming to grips with these difficult issues" (*ibid.*).

ARGUMENT

This case presents no issue warranting review by this Court. The unanimous decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of appeals.

1. Contrary to the contention of petitioner Lead Industries Association (LIA), the decision below does not conflict with this Court's decision in *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, No. 78-911 (July 2, 1980). In *Industrial Union*, this Court vacated a standard issued by the Secretary of Labor setting one part per million (ppm) as the maximum occupational exposure to benzene. The plurality held that the standard was invalid because the Secretary had not made a determination, based on evidence in the rulemaking record,

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(Pet. App. 63a-66a); (2) the overall method used by the Administrator in calculating the lead standard (Pet. App. 66a-70a); and (3) the Administrator's decision not to exclude large or insoluable lead particles from the ambient air standards (Pet. App. 71a-75a).

that exposure to benzene at the consensus maximum level of ten ppm subjected employees to a "significant risk of material health impairment" (slip op. 42). Only based on such a finding, the plurality held, could the challenged standard satisfy the requirement of the Occupational Safety and Health Act of 1970 (OSHA), that a standard be "reasonably necessary or appropriate to provide safe or healthful employment * * *." Section 3(8) of OSHA, 29 U.S.C. 652(8). Petitioner restates the "significant risk" standard articulated in *Industrial Union* by arguing that EPA must set an ambient air quality standard to protect the public only from risks that are "clearly harmful" or "clearly adverse." That contention lacks merit both because it inaccurately restates the *Industrial Union* test and because it improperly seeks to incorporate into the Clean Air Act a statutory standard that applies only to OSHA.

The Clean Air Act provides that ambient air quality standards "shall be standards the attainment and maintenance of which in the judgment of the Administrator, * * * and *allowing an adequate margin of safety*, are requisite to protect the public health." Section 109(b)(1) of the Clean Air Act, 42 U.S.C. (Supp. II) 7409(b)(1) (emphasis added). Based upon a careful examination of the language and legislative history of the Clean Air Act, the court below correctly held that the language chosen by Congress unequivocally demonstrates that the Administrator must set national primary ambient air quality standards that are precautionary—"to protect against effects which have not yet been uncovered by research and effects whose medical significance is a matter of disagreement" (Pet. App. 45a). See also Pet. App. 31a-45a.

Even if the *Industrial Union* plurality's construction of different statutory provisions contained in a different statutory scheme [12] were relevant here, the decisions would not be inconsistent. As the plurality opinion there emphasized, findings of "significant risk" need not be supported "with anything approaching scientific certainty." Rather, "so long as they are supported by reputable scientific thought, the Agency is free to use conservative assumptions in interpreting the data * * * risking error on the side of overprotection rather than under-protection" (slip op. 44-45).

Moreover, unlike the situation in *Industrial Union*, the Administrator *did* make express findings of health impairment here. Although the Administrator's findings were not framed in the "significant risk" lan-

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[12] The divergent language that Congress employed in OSHA and the Clean Air Act reflects the distinctive and different roles played by OSHA "occupational safety and health standards" and the Clean Air Act's "ambient air quality standards." The OSHA standards are directly applicable to each industrial employer subject to the standards, and they are directly enforced by federal officials (29 U.S.C. 653(a)(2), 659). In contrast, the development of ambient air quality standards under the Clean Air Act is only the first step in a federal-state scheme, in which EPA defines the level of air quality "requisite to protect the public health," but leaves primarily to the states the attainment and maintenance of that level. See generally *Train* v. *NRDC*, 421 U.S. 60 (1975). Unlike the OSHA scheme, in which the Secretary of Labor must consider feasibility in arriving at a standard, the requirements of the Clean Air Act are designed to achieve health-protective levels without regard to the economic or technological feasibility of compliance. See S. Rep. No. 91-1196, 91st Cong., 2d Sess. 2-3 (1970), quoted in *Union Electric Co.* v. *EPA*, 427 U.S. 246, 259 (1976). See also pages 14-16, *infra*.

guage that this Court later suggested in *Industrial Union*, the Administrator's findings and the supporting evidence clearly satisfy the Court's concern that federal regulation of pollutants be directed to levels at which real health threats are proscribed. Specifically, the Administrator found that for children: (1) elevated EP at 30 ug Pb/dl represents the first adverse health effect of lead; [13] (2) the more serious effect of anemia begins at 40 ug Pb/dl; and (3) the extremely serious and largely irreversible effect of brain and central nervous system impairment begins at 50 ug Pb/dl (Pet. App. 16a-24a, 49a-62a, 141a-145a). The findings concerning central nervous system dysfunction are particularly significant in that they show that diminished capacity to think, reason, and control behavior begin at blood-lead levels only slightly above those typically identified in urban children (Pet. App. 3a-15a, 56a-57a).

Based on these three findings, the Administrator concluded that 30 ug Pb/dl is the maximum safe

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[13] LIA contends (Pet. 12) that the evidence does not support a finding of adverse health effects below 40 ug Pb/dl. That is a factual question that Congress left primarily to the expert judgment of the Administrator (see Pet. App. 46a & n.50, 51a-54a). The court below found ample support for the Administrator's finding, not only in the Criteria Document, but also in "the testimony of various medical and other scientific experts who participated in the lead standards rulemaking" (Pet. App. 51a-55a). The court also rejected LIA's argument that EP elevation below 40 ug Pb/dl is only a "subclinical" effect and therefore insufficient as a basis for standard-setting, noting that: (1) an effect may be clearly adverse even if it is difficult or impossible to detect by clinical means; and (2) the modern trend in preventive medicine is to detect health problems in their subclinical stages and take appropriate corrective action (Pet. App. 54a-55a).

individual blood-lead level for children, a level designed to protect them not only from adverse EP elevation at 30 ug Pb/dl and above, but also from the increasingly serious adverse health effects of lead beginning at 40 and 50 ug Pb/dl (Pet. App. 49a-58a). The court of appeals thoroughly reviewed the administrative record and found "ample support" for the Administrator's findings (Pet. App. 51a). Both the Administrator and the court of appeals were impressed that the Center for Disease Control had chosen 30 ug Pb/dl as the initial screening point for detection of lead poisoning in children, that is, for identifying children who have already absorbed too much lead from their environment and for whom medical observation or intervention is considered appropriate (Pet. App. 52a-53a).

The record demonstrates that the scientific debate was sometimes heated during the administrative process, and the Administrator was required to make difficult decisions.[14] However, as the court of appeals properly concluded, each of the Administrator's decisions was both reasonable and adequately supported by record evidence.[15] Accordingly, the administrative

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[14] As the court of appeals stated (Pet. App. 58a-59a; footnotes omitted):

> To be sure, the Administrator's conclusions were not unchallenged; both LIA and the Administrator are able to point to an impressive array of experts supporting each of their respective positions. However, disagreement among experts is inevitable * * *. It may be that LIA expects this court to conclude that LIA's experts are right and the experts whose testimony supports the Administrator are wrong. If so, LIA has seriously misconceived our role as a reviewing court.

[15] Indeed, the District of Columbia Circuit noted again the substantiality of these findings in *United Steelworkers, AFL-CIO-CLC* v. *Marshall*, No. 79-1048 (Aug. 15, 1980),

action here well represents the type of rulemaking, based on specific findings supported by the evidence, that this Court identified as necessary in *Industrial Union*.

2. The court of appeals' construction of the "margin of safety" provision is consistent with the language and legislative history of the Clean Air Act. Petitioners contend that the margin of safety allowed by the Administrator is excessive; they assert that an additional margin of safety was improperly provided in virtually every substantive decision that the Administrator made in setting the primary standard. In fact, as the Administrator clearly stated, he sought a margin of safety in only two instances: (1) the selection of 30 *ug* Pb/dl as the maximum safe individual lead blood level for children, and (2) the decision to protect 99.5% of the sensitive population (Pet. App. 152a-154a). In all other instances in which petitioners claim that the Administrator made allowances for a margin of safety, he actually made scientific judgments based on the best available evidence, as the court of appeals correctly recognized (Pet. App. 62a).

Of equal importance, the Administrator's decision to provide for a margin of safety through conservative judgments at two critical points within his analysis, rather than by making a single adjustment at the end of the process, does not show that the stand-

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in which the court applied *Industrial Union* in upholding the regulation of lead exposure in the workplace. The court noted in *United Steelworkers* (slip op. 108 n.93) that EPA's "findings of the subclinical effects of lead—findings virtually identical to those OSHA has made here—were easily sufficient to support the new [EPA] regulation." See also slip op. 99-112.

ard is excessive.[16] The margin of safety for each standard must be tailored to insure that scientific uncertainty is taken into account in an effective manner. In the case of lead, the application of a single margin of safety at the termination of the multistage calculation process would be highly inaccurate. The Administrator decided therefore, and the court of appeals found that decision reasonable, that the standard would be more accurate if he focused on critical points within the analysis in setting the margin of safety (Pet. App. 135a-136a, 152a-154a). The court of appeals properly noted that Congress had left to the Administrator's discretion the choice between such competing methods (Pet. App. 61a-62a). The real test, which the court of appeals found satisfied here, was not whether the Administrator had followed a particular formula, but whether each of his decisions was reasonable and supported by the facts (Pet. App. 62a-63a). See generally Pet. App. 59a-67a.

Petitioner St. Joe Minerals Corporation argues (Pet. 8-11) that the court incorrectly excluded considerations of cost and technological feasibility from the selection of a margin of safety. That contention is unfaithful to the language and scheme of the Clean Air Act, the overriding purpose of which is to protect the public health. In line with that purpose,

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[16] Petitioners' claim that the margin of safety, and thus the standard itself, is excessive is not supported by the evidence. A maximum blood-lead level of 30 ug Pb/dl, protecting 99.5% of the sensitive population, is adequate but not excessive. For example, the Administrator estimated that, given this blood-lead level and population percentage, 20,000 children in central urban areas alone would have blood-lead levels exceeding the maximum safe level of 30 ug Pb/dl (Pet. App. 153a).

Congress simply did not give the Administrator discretion to consider cost or technical feasibility in setting ambient air standards. Neither Section 108, which specifies the factual criteria upon which ambient standards are to be based, nor Section 109, which contains the legal test which they must meet, discusses or otherwise suggests any consideration of cost or technical feasibility. See Pet. App. 32a-38a. Moreover, the Senate Report on the 1970 Amendments states (S. Rep. No. 91-1196, 91st Cong., 2d Sess. 2-3 (1970)):

> In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and, 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to public health.
>
> Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down * * *.

See also Pet. App. 33a-34a.

Petitioners contend that the regulatory scheme, which requires "forced" technology [17] and is unchecked by cost considerations, may result in the closing of portions of critical industries.[18] Petitioners' quarrel

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[17] See *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256-257 (1976); *Train* v. *NRDC*, 421 U.S. 60, 91 (1975).

[18] As this Court has observed, however, there is some flexibility in the Act that may help to mitigate such economic consequences. Ambient standards are not directly applicable to the affected industries; they must be translated into specific emission limitations by the states, which may apply

is not with the Administrator's determination here, but with the statute enacted by Congress. Well aware of this possibility, Congress made a conscious decision that Congress, rather than the Administrator or the courts, must decide whether and how to alter the statutory scheme if basis public health needs should prove to conflict with an industry's economic viability. See Pet. App. 35a-37a.[19] Only if ambient standards are based on health considerations alone can those standards provide Congress with a true picture of the health threat posed by a particular pollutant.

St. Joe argues, however, that the Administrator may consider cost and technical feasibility in selecting a margin of safety, even if he may not do so in selecting an ambient level requisite to protect public health.

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them in a phased manner so long as the ambient standards are attained on a timely basis. Section 110(a)(2) of the Act, 42 U.S.C. (Supp. II) 7410(a)(2). In developing these limitations, the states may consider economic and technical feasibility; such considerations are limited only by the requirement that the ambient standards be timely attained. See *Union Electric Co.* v. *EPA*, *supra*, 427 U.S. at 264.

[19] As the court of appeals noted (Pet. App. 36a n.38), Congress has already acted to address such conflicts in particular instances. Probably the most significant examples are the 1977 extension and relaxation of the automobile emissions standards (Section 202 of the Act, 42 U.S.C. (Supp. II) 7521), and the extension of the deadline for attaining the ambient standards (Section 172(a) of the Act, 42 U.S.C. (Supp. II) 7502(a)). Indeed, the lead industry itself has thus benefitted from congressional action through the nonferrous smelter order provision that was added to the Act in 1977 (Section 119 of the Act, 42 U.S.C. (Supp. II) 7419). In certain circumstances, that Section provides for extensions to 10 years of a deadline for compliance with limitations necessary to meet the sulfur dioxide standard (Pet. App. 36a). Congress is generally expected to undertake a substantial reexamination of the Act in 1981.

This argument improperly assumes that the two decisions are separate and distinct; in fact, there is no such requirement, and the two decisions were not made separately here. See pages 13-14, *supra*. At all events, Congress clearly would have expressed its intention to permit the consideration of such factors for that purpose, given the fact that those factors are otherwise excluded from consideration under the statutory scheme, the entire thrust of which requires that standards be precautionary. As the court of appeals correctly found, however, there is no support for that argument in either the statute or its legislative history (Pet. App. 32a).

St. Joe's argument is simply inconsistent with the margin of safety concept. Congress required a margin of safety to assure that ambient standards would be precautionary, that is, that they would protect against "hazards which research has not yet identified." S. Rep. No. 91-1196, *supra*, at 10. To require that the Administrator reduce the margin of safety that he would otherwise provide, because of cost or technical feasibility, would mean that the margin remaining, if any, would no longer be a margin of safety.[20]

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[20] St. Joe's suggestion (Pet. 8 n.7) that the Act may unconstitutionally delegate legislative power to the Administrator lacks merit because Congress carefully limited the Administrator's discretion. The standard is to be based only on the scientific evidence contained in the Criteria Document required under Section 108 of the Act, 42 U.S.C. (Supp. II) 7408; the rulemaking must conform to the demanding procedures contained in Section 307(d) of the Act, 42 U.S.C. (Supp. II) 7607(d); and the standard must be strict enough to protect public health with an adequate margin of safety under Section 109(b)(1) of the Act, 42 U.S.C. (Supp. II) 7409(b)(1). Moreover, the Administrator has interpreted Section 109 to provide further criteria that constrain him in choosing an adequate margin of safety, including such factors

3. Finally, petitioners contend that certiorari should be granted because the Administrator did not make independent findings supporting the secondary standard that should be set. That contention also lacks merit. In setting the secondary standard, the Administrator must consider a range of public welfare factors, rather than merely those relating to public health. Frequently, public welfare considerations warrant a stricter secondary standard. Based on the evidence reported in the Criteria Document, and on his findings with respect to the primary standard, however, the Administrator here found that a more restrictive secondary standard was not necessary to protect the public welfare (Pet. App. 156a). In view of that finding, which went unchallenged during the rulemaking proceeding, the court below properly held this claim both insubstantial [21] and untimely [22] (Pet. App. 101a-103a).

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as the severity and reversibility of the health effects, the types of evidence and degree of uncertainty concerning known or suspected health effects, and the size of the population risk (Pet. App. 152a).

[21] The court below distinguished the only case relied upon by LIA (Pet. App. 103a; citation omitted):

> Our decision in *Kennecott Copper*, on which LIA relies, involved an attempt by the Administrator to set a secondary standard which was *more stringent* than the primary standard without explaining the basis for this decision and it is therefore inapposite to the instant case.

[22] Section 307(d)(7)(B) of the Clean Air Act provides that "[o]nly an objection to a rule or procedure which was raised * * * during the period for public comment * * * may be raised during judicial review." 42 U.S.C. (Supp. II) 7607(d)(7)(B). See also *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553-554 (1978).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 332534 125